

would finish the public testimony tonight. Obviously, there is no need to rush it. If people have second rounds and they wish to go, we will have to go tomorrow afternoon in finishing. So I would ask the staff to check with their principals, if they have a second round.

We will adjourn now, Judge, until 2:30, at which time we will come back and begin with Senator Kohl. He has to be downtown at a meeting, but either Senator Kohl or Senator Feinstein.

Judge BREYER. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

[Whereupon, at 1:22 p.m., the committee was in recess, to reconvene at 2:30 p.m., the same day.]

#### AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order.

Welcome back, Judge. I realize it was a short lunch break, but I hope you at least got something to eat.

Our next questioner is Senator Pressler.

Senator PRESSLER. No, Mr. Chairman.

The CHAIRMAN. Excuse me. Let me make sure I am correct.

Senator PRESSLER. I think my colleague over there—

The CHAIRMAN. I beg your pardon. Senator Kohl. I am sorry.

#### OPENING STATEMENT OF HON. HERBERT KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. Thank you very much, Mr. Chairman.

Judge Breyer, as you know, John Adams once said that we are a government of laws and not men. But this is, at most, a half truth, for ultimately it is men and women who give meaning to the law. And so it follows that character matters, and matters a great deal.

Character is not only to be found in the lines of your very impressive resume, Judge Breyer; it is also to be appreciated in the exchange of ideas and values and viewpoints that began yesterday and which we are continuing today.

I have first a few open-ended questions that I would like to throw at you.

Judge Breyer, yesterday you said that your mother did not want you to spend too much time with your books, and because of her urgings, you said that your ideas about people do not come from libraries. So I want to ask you something about people, the American people, and the problems that we face today as a Nation. And I hope that you will very much take this opportunity to speak openly and frankly, and perhaps not as a nominee for the Supreme Court but as an American citizen who is intelligent and thoughtful and who has, I know, thought long and hard about the problems that we face as a country.

Judge Breyer, what do you think are the major challenges that we face today as an American society, our problems, whether it be racism, poverty, crime, or drugs, the growing disparity between the rich and the poor in our country? What are some of our major problems? And as we look ahead, how do you think we are going to face and resolve one or two of these major problems as a society?

Judge BREYER. I think, Senator, this document, which is a kind of miracle, the Constitution, has enabled so many different people in this country to produce a government that is reasonably effective, that is democratic in its origin, that permits them individual liberty, and that moves in the direction of fairness.

You know and I know that over the course of the 19th century and the 20th century, our country has become ever more diverse in terms of the groups of people who are here. And the problem at one level is what it has always been: How do these very, very different groups of people manage to live together in a spirit of tolerance, understanding, freedom, fairness, and cooperation that will permit them to build better lives for each other?

That requires a degree of trust in government, because government is the people working together to solve their problems. It requires not too much delegation of authority to government, lest that government turn on them and deprive them of liberty. It requires people working together to produce an economy that can feed them all and give them decent standards of living, while at the same time they share the fruits of that economy so no one is left out.

What tremendous problems, when there are so many people who are left out. What tremendous problems, when, in fact, we are in a world where we have to work so very hard to have that economy working, producing. What tremendous problems, when, in fact, we are so far from the ideal of fairness that the Constitution prescribes. The need for trust, the need to compete in this technical, scientific world where it is so hard to produce a productive economy, the need to share around the results so that people are not left out. And to do all that while maintaining the basic liberty that this document promises.

Those are all the basic problems that I see underneath your words, the words of crime in the cities, lack of education, groups of people that do not enjoy prosperity, the need to keep jobs so that people are at work. All those are symptoms of what I see as those four or five basic problems. That is a challenge for everyone in government, in your branch as well as in the judicial system. And it is a challenge for everyone who is not in government because every single American—I say “us.” We are all in this together. We are all in this together.

That is how I respond, briefly, to what you put.

Senator KOHL. Well, perhaps you can say a few more words. I appreciate your willingness to talk openly and frankly about this. I think those of us that are listening and watching wonder, other than what I believe what you said is that we must look to the Constitution and try to figure out ways together as a people—and maybe that is what you are saying. Let's talk about the growing inequality between the rich and the poor. That is a statistical measure. It is not an opinion.

How do you see us as a society responding to that problem, if you see it as a problem? Again, this is not as a Supreme Court nominee. This is more as a person who may well sit on the Court and may have to confront these questions in a larger way. So maybe as a nominee, but it certainly is as a thoughtful American and as

a person who we are all interested in, what are your thoughts in addition to constitutional issues?

Judge BREYER. I do not claim any special thought or any deeper thought or any special privilege for thought in this area any more than any other American in this country. Every American is trying to earn a living. They are trying to raise a family. They look out and see a lot of crime in the streets. They see a lot of people who are really badly off. They see promises of fairness that are not fulfilled.

They are concerned about their Government. They have to write the check for the car and they have to write the check for the rent, and they have to get their children educated. Life is not necessarily easy for many, many people. And the problem of the country, I do not know, more than that, that is what you would get out of reading a newspaper and out of opening your eyes and looking around.

I think that the challenge for us is to try to make that a little bit better.

Senator KOHL. Well, there are some people who would look at the statistical difference in terms of wealth between those who are extremely well off and most everybody else in our society and resolve this growing disparity as something that is just a fact of life and that these things come and go. There are some who would look at it and say this is not a positive trend in our country.

How would you look at it?

Judge BREYER. It is not a positive trend. I have known—some people are better off than other people. I understand that. And those who are better off, in my view, including me, frankly, have an obligation with every additional penny to give back something to other people, because it is there in a kind of trust. And the only reason we have a society of differences between rich and poor at all is because, in principle, that is supposed to work out, so that even those who are worse off are better off than they would be in some other society.

And that is why I spoke rather strongly about antitrust because then you are getting back into my area of law, and why I felt so strongly about it, because unless you have a policeman like that, then those who are better off are just going to be better off and that is the end of it. But you cannot have that. You have to have a society in which those who are better off understand their obligations towards those who are worse off. And that is what I think.

Senator KOHL. All right. Well, we will get to antitrust a little later.

Judge Breyer, I would like to ask you this: In your opinion, what do you think are the three most important Supreme Court cases of the 20th century? And why?

Judge BREYER. Well, the first is easy. I mean, the first is *Brown v. Board*. And why that is so easy is because, to me, it was clear. I mean, you know, here is the promise in this document, and the promise is the country will be fair. And they wrote it sometime in the middle, last part of the 18th—you know, in the 19th century, and then it was not done. How shocking. How shocking to write a promise like that into the Constitution and it is not done. And it seems to me that *Brown* was a decision of courage, in a sense, but

the courage was do what the law says. Read it. That is what it says. We are going to do it.

I think the judges and everyone else involved in that, good, they were behaving like judges and they were following the law.

Now, a second one, I will tell you, is a little bit, perhaps not as—but I have always felt this is awfully important, and I said this, actually, to the group of Russians: *Cooper v. Aaron*. Why do I say *Cooper v. Aaron*? It is interesting. *Cooper v. Aaron*, which you may or may not remember, was the case in Arkansas where paratroopers were sent to enforce school desegregation. Every judge on the Supreme Court signed his own name to that opinion. What that said is we mean it. But, of course, they are only nine human beings. Nine human beings cannot stand up against a mob of people, particularly if they are led by armed people who do not want them to do it.

So what it required was that the President of the United States, representing the entire country, said they said it and it will be done. And the paratroopers were sent down to see that it was done. And the reason that I think that is so important is because that means that, as a Nation, these words on paper are not words on paper. They are real. And that was a definite, firm commitment to that principle. And I think that is a very important decision, the way that was carried out, for that reason.

Then if you want to go to third, I tend to think of Holmes and Brandeis, as you know, and the dissents in the first amendment area, though they are not decisions, they are dissents. But those dissents played an enormously important role in making certain that freedom, freedom of speech was real.

So those are the things that come into my mind.

Senator KOHL. I think those are three very good choices.

Judge Breyer, I would like to turn to questions on a few specific topics. There are many judges and lawyers today who believe that the sole purpose of the civil justice system is to settle disputes between private parties. Others, including your colleague, Judge Mikva, say that because the courts are public institutions, they must also consider and look out for the public interest, to the extent that it is affected by civil litigation.

You yourself alluded to this yesterday when you told Senator Leahy, and I quote, that "the courts belong to the public."

Where do you come down on this question, Judge Breyer? Is our civil justice system simply about private disputes, or is there more to it than that?

Judge BREYER. More to it than that. I mean, that is my short answer. The object is dispute resolution. Dispute resolution is important. There are other methods of dispute resolution. But dispute resolution on what terms? Dispute resolution on terms of what is fair. Then you get back into the court system.

You have to be careful of saying it is just resolving disputes, because you might be resolving disputes on terms that are not fair. You do not want the stronger party always to win. That solves it, but it is not fair.

Senator KOHL. OK; I am glad we share that belief, because courts cannot afford to ignore the public interest in civil litigation, and we agree on that.

My concern, however, Judge Breyer, is that courts are not striking the right balance today between the public and the private interest. Consider, for example, the troubling use of protective orders and confidentiality orders by courts today. In some cases, these orders shield the public and regulators from crucial information about dangerous and defective products that are discovered in the course of litigation. Court secrecy has prevented the public and regulators from learning about many dangerous products, for example, silicone breast implants, defective heart valves, automobiles, and playground equipment.

Now, obviously, courts need to balance the need for privacy against the need for openness and disclosure, but in many cases today's balance seems less a balance than a knee-jerk preference for privacy and private parties and against the public interest and disclosure.

And so, Judge Breyer, I would like to ask you whether or not you share my view that some judges today are too quick to sanction confidentiality without looking carefully enough at the public interest in disclosure of information regarding dangerous products. Shouldn't the courts at the very least be required to consider public health and safety before allowing for secrecy in civil litigation?

Judge BREYER. What you are focusing on specifically is not when a Government agency or a State agency tries to obtain information about public health and safety, for, obviously, there are broad discovery powers as there should be in the hands of any governmental agency.

Really you are focusing upon two private individuals who are in a private dispute, and sometimes, in the course of that dispute, something will turn up, and the question is: When should it be made public even though one of the parties where it came from does not want it made public?

Now, that kind of answer to that kind of question obviously requires weighing the very important interests that you talked about against the interests of privacy. I do not guarantee it is always done properly. It would be amazing if it were always done properly. It would be the only aware that I am aware of—I mean, always, always, there can be mistakes in that area. But I really think it is up to you in Congress to review this kind of thing systematically. And if you think the line is now not being drawn properly as a general matter, then you can change that line.

Senator KOHL. All right. If I may just ask the question again and answer if you want—I said, Don't you believe that courts should be required—required—to consider the public health and safety before allowing for secrecy in civil litigation? Consider, if courts should be required to consider public health and safety.

Judge BREYER. The reason I was putting it in terms of line-drawing is perhaps it seems obvious to me that in terms of some level of health and safety, of course, of course, no court can or should stand silent when they see an immediate, serious risk to some third party's health or safety. No lawyer can remain silent. No doctor can remain silent.

Senator KOHL. But as you know, there have been several, if not numerous, cases where two parties in a court dispute before a judge will make a secret court settlement involving a product being

used widely but having affected just that one person. It has happened many times—heart valves, automobiles, silicone breast implants—where a court allowed a settlement to be made between two parties in court, full well knowing that that settlement meant that tens of thousands, if not millions of people who were similarly involved with the defective product would, therefore, not know of the defective product.

You are, of course, I am sure, fully familiar with this. And what I am saying is: Don't you believe that a judge should be required to consider public health and safety before that judge allows a secret court settlement of this sort to occur in his court or her court?

That is somewhat of a departure from what you know is the present norm.

Judge BREYER. Yes, and why I am being hesitant is really because I suspect it is a question of changing a legislative standard in general. And I worry that this is somehow going to be coming in front of the Court in terms of an appropriate court rule or in terms of balancing privacy interests. And so I am hesitant to go beyond the general statement. Do you see why I am hesitant to go beyond that? Because it is not something I know enough about to be confident that I am not expressing a view there on something that is likely to come up. That is my hesitancy.

So I sort of feel the general principle, that, of course, when you are a judge, as any other person, of course when you are a judge and you see a real threat to health and safety, of course you have to tell people about it. You cannot let—I mean, that seems to me absolutely clear. And then going beyond that, as to just in what cases and how you draw that line and so forth, that is something I have to hesitate. I have to hesitate.

Senator KOHL. Well, I think I hear you saying you agree, but. But you agree.

Judge BREYER. I agree, but.

Senator KOHL. And I understand that. I understand what you are saying. All right.

I would like to ask a couple questions or thoughts about first amendment and TV violence, Judge Breyer. As you may know, Congress and the American people, including myself and Senator Simon and others, have been looking at the effects of media violence on children. Clearly, media violence, whether it is on our TV screens or in our contemporary music or in video games that we purchase for our children, clearly media violence contributes to violence in our society.

While other things are also factors, like the breakdowns in our society with respect to crime and drugs and families, the fact that these conditions are present does not excuse the excesses of those in the media who peddle violence to our children. And when I talk to people, they agree, and they ask me why Congress or Government is not doing something about it.

It is not always easy to explain the problems associated with the effort to regulate media violence without threatening free speech. However, freedom of speech is not absolute, for, after all, you cannot yell "Fire" in a crowded theater.

Judge Breyer, we all know that it is sometimes appropriate and necessary to enact and uphold reasonable restrictions on speech, and I am sure that you agree.

Suppose that Congress passed a law to ban or restrict the broadcast of TV violence during non-news programs or to set time limits on when violent programs could be shown. If you were called upon to review such a statute or a regulation, what kinds of issues would you consider in your analysis, and what methodology would you use?

Judge BREYER. It is apparent you understand I am concerned with the problem of TV violence. What you are asking is how do I approach this kind of problem in the first amendment area. That is a fair question. And the way I approach it is that I think at the core of the first amendment are what I have described as a kind of cluster of things.

There is political speech. There is also at that core the need to communicate and talk to each other and have conversations where we listen, like around the dinner table, which I described yesterday, which is critical to intelligent discussion and democracy, and there are concerns of expression, expressing—expressing a personality, expressing through art, or through science. There are all those things at the core.

Then you move out from the core. That core is very important and virtually inviolable. As you move out from the core, what you discover in different directions is that sometimes we are concerned with something that seems almost like conduct, and the closer it is to conduct, well, the further it is from the core.

We are concerned with instances where a particular kind of speech might have an immediate harmful impact to society that is tangible and real. That is your example—fire in a crowded theater—or, you cannot solicit a person to commit a crime although you do so in words. Then you discover there are areas where in fact we are talking about the impact on younger people. Imagine the control that society exercises in a grammar school or in a high school.

And then, in another direction yet, you run into instances where the expressive value is totally gone; it is not really communication at all, though it in fact has a negative societal impact. I talked about child pornography.

So as you move out from that core, you look at how far away, you look at whether there are simply rules of procedure—time, manner and circumstance. A town meeting can be run by that. But if you are beyond that, you look to society's needs, and you look as well to the spillover problem, that is to say, have you got a statute that is really narrowly tailored to those needs and will not intrude into the core, or there is a risk that you will chill what is closer to the core.

Those are a few of the things, and the metaphor in my mind is a kind of core of several different things, and the further away you get in a number of different directions, the more you pay attention to society's demands to come in and impose rules and regulations.

Senator KOHL. To what extent would it make a difference if the evidence demonstrated that TV violence caused specific and long-term harm to children? Would that make a difference in your concern?

Judge BREYER. Certainly, as I said, I do not like to discuss it in the context—I am nervous about discussing it in that particular context, for the very reason that it is possibly the subject of litigation; it is possibly the subject of the statute, and my goodness, if I am confirmed, that would come right before us.

But I think as a general matter, your point is a fair point, that the more serious real, tangible harm, the further from the core, the more it is possible to devise or try to devise an appropriate—

Senator KOHL. Are you imagining—and this is just an imagination, I recognize that—but is it conceivable to you, Judge Breyer, that restrictions on media violence could ever pass constitutional muster?

Judge BREYER. That, I think I must stay away from, because I imagine that should legislation pass, one of the arguments that will be made will be the negative of that, and the other side will argue the affirmative of that; and it seems to me very, very important that one approach that concrete problem, if I am on the Supreme Court, with a very, very open mind.

Senator KOHL. OK; and finally in this area, Judge Breyer, does government's ability to protect children from explicit material vary according to the medium, whether print, movie, video game, or information highway, in which it is presented?

Judge BREYER. Media, different media, have in the case law sometimes been treated differently. But I know also there are arguments in particular contexts that they should not be. So it is hard for me to answer that, other than in that unsatisfactory general way.

Senator KOHL. All right. Judge Breyer, yesterday you said that televising Supreme Court oral arguments might be a good idea. I have been a supporter of more radio and TV coverage in the Federal courts. I believe that if we had C-SPAN, a channel for the Supreme Court, that it would help Americans better appreciate their legal system.

So, Judge Breyer, on this area, did you watch any of the O.J. Simpson hearing on TV, and if you did, what are your thoughts on whether televising a hearing of this sort will have a negative effect on the defendant's right to an impartial jury?

Judge BREYER. Let me not talk about the particular case, and let me think about things that were in my mind a year ago or 2 years ago, well before that particular matter arose.

At that time, I voted in favor in the Judicial Conference of experimenting with television in the courtroom. That has been carried out. The results are being evaluated. In Massachusetts, television is in the courtroom. The Massachusetts judges I have spoken to seem generally satisfied. The results of that are being evaluated in the Federal system.

My particular appeals court was not part of the experiment, but not for want of willingness; it was because they could only have a small number. That is the circumstance in which I think my vote in favor of the experiment is right as of this moment, abstracting from this particular case and putting myself back in the frame of mind I was 2 or 3 months ago in respect to this.

That is basically my view. It has not changed.



Senator KOHL. And I appreciate that comment. But are you saying you do not want to answer the question on televising a hearing—do you think that televising a hearing might conceivably have a negative impact on a defendant's right to a fair jury trial?

Judge BREYER. The question, of course, that you are raising there, which is an important question, is the publicity and the publicity on the difficulty of selecting jurors.

Senator KOHL. That is correct.

Judge BREYER. That is a problem, and how that is balanced is not something I have looked into. That is not something I have looked into. It is something that I have read enough and heard enough about to know it is a problem. And that is where you start from, and that is where I start from, too. You are worried about the fairness of the trial. You are worried about the maintenance of a free press. And somehow, the balancing of those things is terribly important—and is not necessarily just for judges.

Senator KOHL. OK; finally, I would like to get back to antitrust for a minute, Judge Breyer. Senator Metzenbaum covered some of the antitrust matters with you, and your answers were very good, but I do have a few followups and some general questions to ask.

Recently, we celebrated the centennial of the Sherman Act. For over 100 years, this landmark measure has protected the principles that we hold most dear—competition, fairness, and equality. I believe that the people who wrote the Sherman Act were driven by a variety of beliefs. They wanted to encourage economic efficiency. They wanted to help the little guy, the small businessman, by preventing large concentrations of corporate power. And ultimately, they wanted to help consumers.

The antitrust laws are important because they ensure that competition among businesses of any size will be fair and that consumers will pay lower prices for their goods. And these laws are non-partisan; they have been vigorously enforced by both Republican and Democratic Presidents.

Judge Breyer, I am concerned that some judges would disregard the legislative intent of the antitrust laws and substitute their own ideological agenda. Let me read you two statements about the Sherman Act. The first is by Judge Posner of my own seventh circuit, and I quote:

If the legislature enacts into statutory law a common law concept as Congress did in the Sherman Act, that is a clue that the courts are to interpret the statute with the freedom with which they interpret a common law principle, in which event the values of the Framers may not be controlling at all.

The second quote is by Justice Souter, speaking before this committee:

When we are dealing with antitrust laws, we are dealing with one of the most spectacular examples of delegation to the judiciary that our legal system knows. Certainly, a respect for legislative intent has got to be our anchor for interpretation.

Judge Breyer, which statement reflects the better view in your opinion? Should the courts ever interpret the Sherman and the Clayton Acts without exploring the legislative intent of its authors?

Judge BREYER. I discussed that, actually, in a debate that I had with Judge Bork where we took opposite sides to a degree on that question, and I think I publicly there side with the second view.

Senator KOHL. OK; I would like to talk for a minute about price-fixing because it is of particular concern to me. Since the *Dr. Miles* case in 1911, we have had in this country a rule that prohibits manufacturers from setting the retail price of their products by independent retailers. But some people have begun to argue that we should treat vertical price-fixing differently from horizontal price-fixing.

As Robert Bork wrote in "The Antitrust Paradox," it should be completely lawful for a manufacturer to fix retail prices. Do you agree with this sentiment?

Judge BREYER. I can say the debate was quite interesting. This was in the same debate. And basically, Judge Bork—in my recollection of the debate, we were talking about the Robinson-Patman Act, and he was arguing about that, and in that context I think I made fairly clear that if Congress had the intent of doing something that one might think was not necessarily according to price theory principles, well, then, it did, and it is our job to carry it out.

In that same debate, we discussed retail price maintenance, and it was my own view, that I believe I expressed fairly clearly, that the laws against resale price maintenance were good, sound anti-trust law. I think the example that I used was that years and years ago when I was a student, there were economist professors—somebody, I think, at the University of London, a Professor Yamey, had written a book and had said here are the pros, and here are the cons; what it boils down to is laws against retail price maintenance help the consumer. They bring about lower prices.

And what I asked Judge Bork is what has changed; what has changed. Now, I understand people have different views on that issue, but I think I have expressed my own fairly clearly, quite some time ago.

Senator KOHL. I thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Pressler.

#### **OPENING STATEMENT OF HON. LARRY PRESSLER, A U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA**

Senator PRESSLER. Thank you very much, Mr. Chairman.

Judge Breyer, I am particularly happy to welcome you here. Having once been your student in law school, I take particular delight in seeing you.

Judge BREYER. Thank you.

Senator PRESSLER. And I very much appreciated your remarks during yesterday's hearing when you said that when you deal with cases, you listen to the party, and then try to repeat back the argument in your own words to the other side. I frequently do that in dealing with constituents—repeat back their position. I think it is a wonderful way to proceed.

We have in my State of South Dakota and throughout America, a subject that has not been brought up yet here today in this hearing. Many other subjects have been covered, but I do not believe we have talked about fee-owned land in Indian country.

I know that Indian jurisdictional questions are very complex, and a lot of these matters come to the Supreme Court; in fact, someone